PROGRESSIVE INSURANCE BHD *a*

v.

PILE FORCE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR *b*
VINCENT NG J
[SUIT NO: D1-22-845-1997]
29 DECEMBER 2005

CIVIL PROCEDURE: *Consent order - Effect of - Conduct of litigant - Unperfected order - Rules of the High Court 1980, O. 33 rr. 2 & 5* *c*

The Government awarded the first defendant a tender for the Rancangan Tebatan Banjir Wilayah Persekutuan project ("Said Contract"). In consideration thereof, Bank Bumiputra Malaysia ("BBM") executed a Bank Guarantee with the Government ("Said Guarantee"), guaranteeing the due performance of the *d* Said Contract by the first defendant. The plaintiff also executed a performance bond undertaking to indemnify BBM from and against all claims, demands, losses, damages, costs, charges and expenses sustained or incurred by reason of the Said Guarantee ("Performance Bond"). The second to fourth defendants executed a letter of indemnity agreeing to indemnify the plaintiff for any money *e* claimed under the performance bond upon demand being made subject to the terms and conditions thereunder. As consideration for the Government making advances to the first defendant, the plaintiff also executed an Insurance Guarantee ("Insurance Guarantee"). The second to fourth defendants executed another letter of indemnity with the plaintiff whereby they agreed to indemnify *f* the plaintiff for any claim made under the Insurance Guarantee. BBM and the Government made a demand under the Performance Bond and Insurance Guarantee respectively and the plaintiff complied with the demand. The plaintiff alleges that a balance is still due to be paid to it under the letters of indemnity which is the subject matter of this suit. The plaintiff filed a writ of summons *g* ("encl. 1") against the defendants for the balance payable to them under the Performance Bond and Insurance Guarantee respectively. Default judgment was entered against the first, third and fourth defendants. The fourth defendant set aside the judgment in default entered against him and filed his defence. The second and fourth defendants are represented by common counsel and their defences are on the basis of *non est factum*. In addition, the second defendant *h* counter-claimed for a declaration that the letters of indemnity allegedly executed by him are null and void. An application to dispose of the suit through an analysis of certain signatures in five documents by a handwriting expert was filed by both parties ("encl. 57") and a consent order was entered accordingly ("consent order"). The handwriting expert certified that the handwriting on the *i*

documents were the genuine and true signature of the fourth defendant. Based on the terms of the consent order, judgment was entered for the plaintiff in encl. 1 and the second defendant's counter-claim was dismissed ("said decision"). The second defendant has now filed an appeal with the Court of Appeal against the said decision and filed a summons-in-chambers ("encl. 91") to stay execution and set aside the said decision. The sole issue before this court today is whether the second defendant should be bound by the consent order.

Held (allowing encl. 1 and dismissing encl. 91):

[1] It is clear from the records and his own conduct that the second defendant was very much a party to the consent order. The second defendant had a clear and consistent intention to be bound by the finding of the private handwriting expert even before the date when the said consent order was recorded. From all the facts and circumstances which led to the said consent order, it is very clear that the second defendant was minded to raise the issue that he was not bound by the consent order only after the parties had secured the finding that the private handwriting expert was not in his favour. This conduct of the second defendant is wholly unbecoming and reprehensible. (pp. 563 b-c, g & 564 c-d)

[2] Though the said consent order had not been perfected, it is trite law that no party should be allowed to set aside such an unperfected consent order as of right bereft of any cogent grounds and even in the teeth of his adverse conduct. When parties consent to abide by a certain course of disposal of an action, it surely entails consent of one to be bound by such course of disposal even when as in the instant case it involves the authenticity of a signature of another defendant. (p. 564 e-g)

Case(s) referred to:
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(foll)***
Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd [2004] 4 CLJ 834 HC ***(refd)***
Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 CLJ 845 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 33 rr. 2, 5

For the plaintiff - SY Chiam; M/s Azim, Tunku Farik & Wong
For the defendants - Ravinathan Mutiah; M/s Ravi Muthiah & Co

Reported by Sharmini Pillai

JUDGMENT

Vincent Ng J:

Background Facts

On 10 September 1997, the plaintiff took out a writ of summons (encl. 1) against the defendants claiming a sum of RM676,557.16 being the balance payable to it under a Performance Bond and Insurance Guarantee respectively. The 1st, 3rd and 4th defendants failed to enter appearance and default judgment was entered against them. The suit against the 2nd defendant had been set down for trial, but was adjourned due to the 4th defendant's application to set aside the default judgment. The 4th defendant succeeded to set aside the judgment and filed his defence. At the outset, it is pertinent to note that the law office of Messer Ravi Muthiah & Co is the common counsel on record for both the 2nd and 4th defendants. The 2nd and 4th defendants defences are similar. In short, they raise the defence of *non est factum*. Also, in the case of the 2nd defendant, he counter-claimed for declaration that the Letters of Indemnity allegedly executed by him on 24 November 1994 and 2 December 1994 are null and void.

The Plaintiff's Case

On or at about 18 October 1994, the Government awarded the 1st defendant a tender to construct four bridges across Sungai Batu under a project known as Rancangan Tebatan Banjir Wilayah Persekutuan (the contract). As consideration, Bank Bumiputra Malaysia executed a Bank Guarantee with the Government, to guarantee the due performance of the contract by the 1st defendant. The plaintiff also executed a performance bond wherein it undertook to indemnify Bank Bumiputra Malaysia from and against all claims, demands, losses, damages, costs, charges and expenses that may be sustained or incurred by reason of the said guarantee. On 24 November 1994, the 2nd to 4th defendant executed a letter of indemnity whereby they agreed to indemnify the plaintiff for any money claimed under the performance bond upon a demand being made together with interest at the rate of 3% above prima rate calculated from the date of such demand. Further, on 2 December 1994, as consideration for the government's agreement to give advances to the 1st defendant, the plaintiff executed an insurance guarantee. On the same day, the 2nd to 4th defendant executed another letter of indemnity with the plaintiff whereby they agreed to indemnify the plaintiff for any claim under the insurance guarantee. Subsequently, Bank Bumiputra Malaysia and the government made a demand for a sum of RM393,704.67 and RM930,200.11 under the performance bond and insurance guarantees respectively. The plaintiff complied with the demand. After deduction of cash collateral of RM647,384.02,

the plaintiff alleges that a balance of RM676,557.16 is still due to be paid to it under the letters of indemnity. The said amount is the subject matter in this suit.

The Case Management

On 2 December 2002, the plaintiff's counsel informed the court that parties intended to file an application to dispose of the suit through analysis of certain signatures in five documents by a handwriting expert jointly appointed by both parties. A formal application (encl. 57) to that effect was filed, and on 26 March 2003 the order was allowed by consent in which all parties agreed that they were to be bound by the result of the expert report. The agreement was that, if the report is in the 2nd and 4th defendants' favour, the plaintiff's claim would be dismissed and the 2nd defendant's counter-claim would be allowed. However, if the same is in the plaintiff's favour, then the plaintiff's claim ought be allowed and the said counter-claim would be dismissed. It was also the agreed by the parties that the documents were to be examined by a handwriting expert from the Jabatan Kimia Malaysia. Months passed, but the parties were unable to get any result form the government handwriting expert. When the case was called before the court on 13 July 2004, parties disclosed to the court that they have agreed to appoint a private handwriting expert. Again, they made known to the court that they agreed to be bound by the result of the examination conducted by private handwriting expert and resolve the suit with finality. Thus, on that date an order by consent of all the parties were entered (the consent order). The documents were then returned to the parties for further action.

On the case management date of 25 November 2004, the court was informed that the appointed handwriting expert, one Mr. Siow Kwen Sia had prepared his report and a copy was produced and marked as encl. 85. Also, a copy of the handwriting expert credentials on his expertise (encl. 86) was tendered to court. In brief, the expert certified that the handwriting on the documents were the genuine and true signature of the 4th defendant. Based on the parties prior agreement on the mode of case disposal referred to earlier, I entered judgment for the plaintiff as prayer in prayer (a) to (c) encl 1 and dismissed the 2nd defendant counter-claim. Now, the 2nd defendant has filed an appeal with the Court of Appeal against 25 November 2004 judgment. On 23 December 2004 the 2nd defendant filed a summons in chambers (encl. 91) *inter alia* to set aside the judgment of 25 November 2004 and for an order of stay of execution of that judgment.

Enclosure 91

The application was supported by affidavits affirmed by the 2nd defendant's counsel (encl. 90) and the 2nd defendant (encl. 89). In encl 90 the 2nd defendant's counsel gave his reasons for his absence on 25 November 2004

and crave the court's indulgence. He averred nothing more. The 2nd defendant in his affidavit deposed that in his statement of defence he had challenged the fact alleged by the plaintiff. Hence, the issue whether or not the 4th defendant is the actual author of the documents sent for expert inspection does not concern him in any manner. Thus, he contends that he should be given an opportunity to have his day in court.

My Reasons For Allowing Encl. 1 and Dismissing Encl. 91

It is clear form the records and his own conduct (before the private handwriting expert had made his finding) that the 2nd defendant was very much a party to the consent order. It was pursuant to the consent order that this court had recorded the judgment on 25 November 2004 whereby judgment was given to the plaintiff against both the 2nd and 4th defendants with costs and also the 2nd defendant's counter-claim was dismissed with costs. We have to be mindful that both the 2nd and 4th defendants were represented by the same counsel who had on 13 July 2004 requested the court to record the consent order in the following terms:

> … **Dengan persetujuan,** dokumen asal terlibat kes ini akan diserahkan kepada pakar tulisan swasta yang dipersetujui oleh pihak-pihak bersama dan pihak-pihak akan terikat kepada keputusan pakar tulisan swasta ini *untuk memutuskan secara muktamad* tindakan ini iaitu samada:
>
> (a) untuk menarik balik tindakan ini dan memasukkan Penghakiman terhadap tuntutan balas dengan kos; atau
>
> (b) memasukkan Penghakiman untuk tuntutan dan menolak tuntutan balas dengan kos.

Also earlier on 29 January 2004, Mr. Ravi appearing as counsel for both the 2nd and 4th defendants informed the court as follows:

> Kes akan dapat keputusan berdasarkan lapuran kimia pihak-pihak telah bersetuju yakni **sekiranya asal - kedua-dua D2 dan 4 liable** …

This shows that the 2nd defendant had a clear and consistent intention to be bound by the finding of the private handwriting expert even before the date when the said consent order was recorded, that is, on 13 July 2004. It is pertinent to note that the parties must have agreed to resolve this case with finality as it is (a 1997 matter) a very old pre 2000 case. The intention to finally resolve this old matter could be gleaned from the following very pertinent then prevailing circumstances, at the time and after the said consent order was recorded:

(a) it would be pointless for this court and the parties to adopt the approach pertaining to the handwriting expert's opinion in the resolution of the case if only the case against the 4th defendant is resolved whilst the case against the 2nd defendant remain unresolved and a trial would still be necessary.

(b) there was no preparation for trial of the case against the 2nd defendant by him or his counsel during the substantial period of time from 26 March 2003 to 13 July 2004 whilst waiting for the government chemist's report, and even thereafter, when that failed, the private handwriting expert's report.

Thus, after considering my recorded notes and all the facts and circumstances which led to the said consent order, it is very clear that the 2nd defendant was minded to raise the issue that he was not to be bound by the consent order only after the parties had secured the finding of he private handwriting expert which was not in his favour. This conduct on the part of the 2nd defendant is wholly unbecoming and reprehensible as, had the private handwriting expert's finding been adverse to the plaintiff's case, I am sure the 2nd defendant would have been happy to be bound by the finding and insist that the plaintiff's claim be dismissed with costs and judgment be entered on his counter-claim.

Though it is common ground that the said consent order has not to date been perfected, yet nevertheless, it is trite law that no party should be allowed to set aside such unperfected consent order as of right bereft of any cogent grounds, and even in the teeth of his adverse conduct.

The 2nd defendant also raised the issue that his line of defence in the pleadings did not hinge on the authenticity of the 4th defendant's signature. I would hold that this line of attack on the said consent order is a non-starter and it is inapplicable to cases of setting aside of a consent order. The simple reason is that, when parties consent to abide by a certain course of disposal of an action, it surely entails consent of one to be bound by such course of disposal even when, as in the instant case, it involves the authenticity of a signature of another defendant. It is pertinent to note that this court's approach herein is consistent with the words "whether raised by the pleadings or otherwise" found in O. 33 r. 2 and 5 of the Rules of the High Court 1980; notwithstanding that the issue on the 4th defendant's signature was not raised or pleaded by the 2nd defendant in his defence. See the Federal Court case of *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301 FC, which held as follows:

> Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures

> applicable during that stage are complied with promptly and not abused. The other example is the procedure under O. 33 r. 2 of the RHC which states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact or partly of law, **and whether raised by the pleadings or otherwise**, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. As a complement to the procedure the parties are encouraged to co-operate with each other in the conduct of the proceedings because their co-operation is necessary to facilitate the speedy disposal of cases. (emphasis added)

In my view the *ratio* in *Tan Geok Lan* (*supra*) must be read in conjunction with *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 CLJ 845 CA where it was held that:

> Here, both counsel had consented to proceed in a particular way. An order made by consent in the absence of fraud can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

(See also my decision in *Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd* [2004] 4 CLJ 834 HC.)

It was for all the aforesaid compelling reasons that one had to allow encl. 1 with costs and dismiss the 2nd defendant's counter-claim with costs. In the event, encl 91 has to be and is dismissed with costs.